A

ANN WAM TIANG

v.

GEE SIEW YEE

B

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: 22-581-2002]
18 APRIL 2006

C ***CIVIL PROCEDURE:*** *Judgments and orders - Consent order - Application for variation - Whether consent order disposed of rights between parties - Whether court had jurisdiction to vary consent order due to interlocutory nature of the order made - Whether plaintiff need not commence a fresh action to set aside or vary the consent order*

D This was the plaintiff's application to vary a consent order reached between the parties herein. The consent order was made during the hearing of an interlocutory application filed by the defendant to set aside an interim injunction granted by the court. By the consent order, the parties had agreed to discharge the injunction order based on the defendant's undertaking not to dispose of certain shares pending disposal of the suit. However, as a result of a corporate exercise the said shares were acquired and the defendant received cash payment of RM715,000. The defendant objected to the plaintiff's application on the ground that the consent order was already perfected and the court lacked the jurisdiction to vary the said order.

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Held (allowing plaintiff's application to vary consent order):

G **(1)** If an order fully disposes of the rights of the parties thereto, it is a final order and if it does not, the order is merely an interlocutory order. The court is clothed with ample powers at this interlocutory stage of the proceedings to meet the justice of the case between litigants. It can set right what was a slip

H up by plaintiff's counsel who did not anticipate the high probability of the transmutation of company shares in the course of time. In this exercise, the court should subject the plaintiff to being condemned in costs of the application. (para 13)

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(2) The consent order did not finally dispose of the rights of the parties as the suit was presently in progress and the plaintiff had filed the notice to appear for pre-trial case management with a view to fix a trial date. Due to the interlocutory nature of the order made, this court had the jurisdiction to vary the consent order without the need for the plaintiff to commence a fresh action to set aside or vary the consent order *(Pyrcell v. F C Trigell Ltd & Anor)*. In exceptional cases, even a consent order that is perfected can be set aside in the same action. Furthermore, in light of what had happened after the consent order was recorded, the subject matter of the consent order was no longer in existence and unless it was varied, the agreement by the parties would remain a dead letter. (paras 14, 15 & 16)

(3) The court was not privy to what the defendant had done to the cash payment received that constituted unjust enrichment pending trial. In order to avoid such unjust enrichment to the defendant pending disposal of the suit, the court ought to exercise its discretion to preserve the subject matter in dispute. It would cause grave injustice to the plaintiff if the court refused the order sought by the plaintiff. (para 16)

Case(s) referred to:

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

Chong Fook Kam & Anor v. Shaaban & Ors [1970] 2 MLJ 1970 ***(refd)***

Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2004] 4 CLJ 232 CA ***(refd)***

Haron Mohd Zaid v. Central Securities (Holdings) Berhad [1982] CLJ 293; [1982] CLJ (Rep) 26 PC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 SC ***(refd)***

Lee Teng Siong v. Lee Geok Thye Holding Sdn Bhd [2003] 4 CLJ 834 HC ***(refd)***

Ooi Siew Yook & Ors v. Lim Bar Kee [1987] 2 CLJ 237; [1987] CLJ (Rep) 814 HC ***(refd)***

Purcell v. FC Trigell Ltd & Anor [1971] 1 QB 358 ***(refd)***

Tong Lee Hwa & Anor v. Chin Ah Kwi; Tong Chong Fah v. Chin Ah Kwi [1971] 2 MLJ 75 ***(refd)***

For the plaintiff - Ramdas Tikamdas; M/s Siva, Ram & Assoc

For the defendant - Shahul Hameed Amirudin (Madiha Mahmood with him); M/s Zul Rafique & Partners

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:

Background Facts

[1] On 17 April 2002, the plaintiff took out a writ of summons (encl. 1) coupled with statement of claim against the defendant – who was formerly in close relationship with him that turned decidedly sour – principally to restrain the defendant from selling or conducting any dealing or transaction with 650,000 shares in Sunway Construction Berhad (the SunCon shares) and seeking the return of same with immediate effect to him. Alternatively, if the SunCon shares could not be returned to him, the plaintiff prayed that the court enter a judgment in his favour in the sum of RM1,495,000. The plaintiff's case was grounded on the fact that on 3 September 1997 he had loaned to the defendant the SunCon shares to be pledged into the defendant's margin account in South Johor Securities Sdn Bhd (known presently as Arab Malaysia Securities Sdn Bhd). Even though the SunCon shares were given to the defendant in 1997, it was only nine months later, to be exact on 30 June 1998, that the defendant executed an acknowledgement letter admitting the loan transaction and agreed that a formal agreement would be entered into later. The defendant promised to return the SunCon shares to the plaintiff when her margin account reached 170%. The plaintiff alleges that despite his repeated requests, the defendant refused to comply. Despite their former relationship, due to the nature of the plaintiff's application, the argument by both sides revolved around dispassionate points of law and procedure rather than hotly contested facts or blameworthiness.

[2] A week after filing this suit, namely, on 24 April 2002, the plaintiff applied by way of an *inter parte* summons in chambers (encl. 3), *inter alia*, for an injunction to restrain the defendant from disposing of the SunCon shares and, also for a mandatory injunction for the return of the SunCon shares. On 27 June 2002, after hearing the plaintiff's counsel, I allowed the prayer for prohibitory injunction restraining the defendant from disposing the SunCon shares. On 19 September 2002, the defendant through her solicitors filed an application by way of a summons in chambers (encl. 8) to set aside 27 June 2002 order. Thereafter,

affidavits were exchanged. On 15 January 2003, the parties appeared before the court and informed that they have reached a compromise. A draft consent order duly signed by counsel on both sides (encl. 10) was tendered, and as requested the court recorded same as a consent order. This consent order has since been perfected and extracted. It reads:

Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Dagang)

Guaman No: 22-581-2002

Antara

Ann Wam Tiang – Plaintif
(No. Kad Pengenalan : 5065216)

Dan

Gee Siew Yee – Defendan
(No. Kad Pengenalan : 6727205)

Di Hadapan Yang Arif Dato' Vincent Ng Kim Khoay
Pada 15 Haribulan Januari 2003
Dalam Kamar

Perintah

Atas permohonan defendan yang dinamakan di atas dan **setelah mendengar** Encik D Krishna dan Encik Edmund Ponniah, peguamcara bagi pihak Plaintif dan Encik Peter Skelchy, peguamcara bagi pihak Defendan, **adalah diperintahkan secara persetujuan** bahawa:

a) Plaintif menarik balik permohonan injunksi bertarikh 27 haribulan Jun 2002;

b) Defendan mengaku janji tidak akan menjual dan/atau pindahmilik 650 milik saham Sunway Consruction Berhad yang kini di dalam milikan Defendan sehingga pelupusan secara muktamad tindakan ini dan juga mengaku janji bahawa saham-saham tersebut akan bebas daripada segala bebanan pada tarikh keputusan di Mahkamah Tinggi Kuala Lumpur dalam tindakan ini;

A c) Plaintiff setuju membayar kos sebanyak RM15,000.00 sebagai kos permohonan injunksi kepada Defendan atau peguamnya;

d) Defendan diberi hak membalas Afidavit Plaintif bertarikh 3/12/02 semasa atau sebelum perbicaraan penuh kes ini.

B Bertarikh pada 15 haribulan Januari 2003

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Noradura binti Hamzah
C Penolong Kanah Pendaftar
Mahkamah Tinggi
Kuala Lumpur.

Subsequent Events

D **[3]** On 31 May 2004, pursuant to a take-over offer exercise, the SunCon shares were acquired by Sunway Holdings Incorporated Berhad (SunInc). And, on 20 July 2004, the SunCon shares that were registered in the name of the defendant were converted to SunInc shares. As a result of the corporate exercise, for every one
E ordinary shares in SunCon, the defendant received cash of RM1.10 per share (amounting in total of RM715,000) and one ordinary share of RM1 each in SunInc (amounting in total to 650,000 SunInc shares). It is common ground that the defendant did not seek any leave of court before accepting the said cash of
F RM715,000 and the converted 650,000 SunInc shares in substitution for SunCon shares.

The Plaintiff's Application For Variation Of The Consent Order

G **[4]** On 6 December 2004, the plaintiff filed a summons in chambers (encl. 33) to modify and/or vary the above consent order as per the annexure attached with the application. Enclosure 33 (as amended on 18 April 2006) reads:

H **Saman Dalam Kamar**

Benarkan semua pihak yang berkenaan hadir di hadapan Hakim pada 28 haribulan Feb 2004, pukul 9.00 pagi untuk mendengar satu permohonan oleh Plaintif untuk Perintah-perintah seperti berikut:

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(a) Bahawa Perintah bertarikh 15/1/2003 diubah dan/atau dipinda sepertimana yang ditandakan dengan dakwa merah di dalam Cadangan Perintah yang dilampirkan bersama-sama Saman Dalam Kamar ini.

(b) Bahawa Defendan memasukkan ke Mahkamah Yang Mulia ini sejumlah wang sebanyak RM 715,000.00 bersamaan faedah sebanyak 8% setahun dari 24/6/2004 sehingga tarikh pembayaran masuk ke Mahkamah Yang Mulia ini dalam masa 30 hari dari tarikh Perintah ini.

(c) Kos permohonan ini adalah di dalam kuasa

(d) Lain-lain perintah atau relif selanjutnya yang difikirkan adil dan perlu oleh Mahkamah Yang Mulia ini.

[5] The proposed amended order annexed with encl. 33 is couched in the following terms:

Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Dagang)

Guaman No : 22-581-2002

Antara

Ann Wam Tiang – Plaintif
(No. Kad Pengenalan : 5065216)

Dan

Gee Siew Yee – Defendan
(No. Kad Pengenalan : 6727205)

Di Hadapan Yang Arif Dato' Vincent Ng Kim Khoay
Pada 15 Haribulan Januari 2003
Dalam Kamar

Perintah Terpinda

Atas permohonan defendan yang dinamakan di atas dan **setelah mendengar** Encik D. Krishna dan Encik Edmund Ponniah, peguamcara bagi pihak Plaintif dan Encik Peter Skelchy, peguamcara bagi pihak Defendan, **adalah diperintahkan secara persetujuan** bahawa:

a) Plaintif menarik balik permohonan injunksi bertarikh 27 haribulan Jun 2002;

A b) Defendan mengaku janji tidak akan menjual dan/atau pindahmilik *dan/atau menjalankan urusniaga atau transaksi dalam apa cara sekali pun berkenaan dengan* 650 milik saham Sunway Construction Berhad *dan/atau sebarang saham pengganti/waran dan atau wang tunai dan juga jika ada dividen-dividen yang dibayar atau akan dibayar untuk saham-saham* yang kini di dalam milikan Defendan sehingga pelupusan secara muktamad tindakan ini dan juga mengaku janji bahawa saham-saham tersebut akan bebas daripada segala bebanan pada tarikh keputusan di Mahkamah Tinggi Kuala Lumpur dalam tindakan ini;

C bi) *Defendan memasukkan ke Mahkamah Yang Mulia ini wang sejumlah RM 715,000.00 bersamaan faedah sebanyak 8% setahun dari 24/6/2004 sehingga tarikh pembayaran masuk ke Mahkamah Yang Mulia ini dalam masa 14 hari dari tarikh perintah*;

D c) Plaintiff setuju membayar kos sebanyak RM 15,000.00 sebagai kos permohonan injunksi kepada Defendan atau peguamnya;

E d) Defendan diberi hak membalas Afidavit Plaintif bertarikh 3/12/02 semasa atau sebelum perbicaraan penuh kes ini.

Bertarikh pada 15 haribulan Januari 2003

Bertarikh semula pada haribulan 2004

F **The Defendant's Objection**

[6] The defendant contends that this court is precluded from granting the orders as prayed for by the plaintiff in encl. 33. The defendant's case is grounded on the contention that, in law, a G consent order is not a judgment *per se*. It is nothing more than an agreement between the parties, the terms of which have been recorded by the court. And, when recording a consent order or judgment, the court is not exercising its adjudicative function and is merely giving due recognition (that was then mutually sought) H and effect to a new agreement between the parties. Thus, by having the terms of the compromise reached by mutual agreement recorded as a consent order by the court, the agreement becomes a rule of court that was a super-added command. And, the court's power to interfere will not be exercised (or does not exist) I after any consent order or judgment has been perfected, as what

had happen in this suit. Furthermore, the procedure for seeking a judicial rescission of a compromise that has been made a rule of court is identical to that required in relation to any other contract, and that is, to commence a fresh action seeking a declaration of invalidity or an order setting aside the compromise with consequential directions. In support, the defendant's counsel cited several case authorities, *inter alia*, *Lee Teng Siong v. Lee Geok Thye Holding Sdn Bhd* [2003] 4 CLJ 834 (the decision of this court); *Chong Fook Kam & Anor v. Shaaban & Ors* [1970] 2 MLJ 1970 FC; *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185 FC; *Tong Lee Hwa & Anor v. Chin Ah Kwi; Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75 FC; and *Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232, CA.

The Plaintiff's Arguments

[7] The plaintiff argued that the consent order dated 15 January 2003 which is now sought to be varied is not a final order in that it does not finally determine the dispute between the parties in respect of the subject matter of this suit. The consent order merely preserves the subject matter of this suit pending final disposal. The defendant has given an undertaking not to sell and/or transfer the 650,000 of the SunCon shares registered in her name until the final disposal of this suit, and that the same shall be free form any encumbrances on the date of final disposal of this suit. If the subject matter of this suit were to remain in its present form, the consent order would be a mere dead letter because the SunCon shares no longer exist. It could not be the law that the court is powerless to rectify the predicament faced by the plaintiff by invoking its inherent jurisdiction to vary the consent order to reflect the new scenario which existed after the corporate exercise. The plaintiff further contended that only by allowing the variation of the consent order that the undertaking previously given by the defendant under the consent order will maintain its intended effect otherwise it would be merely illusory and cause grave injustice to the plaintiff. The plaintiff further states that the proposition that the court cannot vary or set aside a consent order except by fresh action should apply only to final orders or judgments which finally dispose of the rights or determine the cause of action between the parties before the court. The plaintiff finally contends that the

facts in this suit are clearly distinguishable from the facts obtaining in the case authorities cited by the defendant, as 15 January 2003 order is an interlocutory order and not a final order.

Analysis

[8] Edgar Joseph Jr. J in *Ooi Siew Yook & Ors v. Lim Kar Kee* [1987] 2 CLJ 237; [1987] CLJ (Rep) 814 (as he then was) had occasion to deal with the question whether the court had jurisdiction to vary a consent order made in respect of a family owned company. In that case the consent order dated 25 July 1986, arising out of a pending petition concerning the company which prayed for numerous reliefs but not for winding up. The brief facts of that case are as follows. A consent order was entered by agreement of the parties, the effect of which was that all cheques drawn on the company's current accounts with various banks in the city were to be signed by the father and his wife jointly. Shortly after the consent order was made, the petitioners – who were the wife and the children – found that it was unworkable because they said that the father was unreasonably withholding his signature to various cheques intended as payment to creditors. They were concerned that if such a state of affairs were to continue, the business interests of the company would be seriously damaged and the company immobilised; most particularly, they were very concerned about the company's ability to implement a major Government contract for the construction of a bunded reservoir in Sabah. The company had to expend money on work and labour and the purchase of equipment, not to mention other things; this was essential if it was to fulfil its contractual obligations. There were also the interests of the other party to this contract to be considered. On the other side of the coin, the father was concerned that if he were to lose his mandate to sign the company's cheques, he would lose control of the company and, thus, be at the mercy of the petitioners.

[9] This is how the learned judge expressed his opinion on the issue at hand:

> At the outset, I invited counsel to address me on the question whether I had the jurisdiction to vary the Consent Order in the particular circumstances of this case. I was satisfied that I had. It is not difficult to cite an array of cases to support this proposition; but, the following passage in the judgment of Denning MR in *Purcell v. FC Trigell Ltd & Anor* [1971] 1 QB 358, (Purcell) suffice:

> The plaintiff says that no appeal lies from an order made with the consent of the parties, except in circumstances in which a contract may be set aside or varied, such as mistake, misrepresentation, and so forth: and that this applies to interlocutory orders as well as to final orders. Mr Hicks for the plaintiff relied in this regard on *Toder v. Sansam* [1775] 1 Bro PC 468. I think that the plaintiff puts his case too high. I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters. ... *The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.* (emphasis added)

[10] Clearly, *Purcell (ibid)* is the authority which gives the court jurisdiction to vary a consent order made in the nature of an interlocutory order. On the question: what is an interlocutory order? Sir William Douglas delivering the judgment of the Privy Council in *Haron bin Mohd Zaid v. Central Securities (Holdings) Berhad* [1982] CLJ 293; [1982] CLJ (Rep) 26 observed that the Federal Court in Malaysia has settled the law in this respect by applying Lord Alverstone's test in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547 for the purpose of determining whether an order is final or interlocutory. The board held that there was no error in the Federal Court's reasoning and the test is both sound and convenient. The Bozson test advanced by Lord Alverstone CJ is this:

> Does the judgment or order, as made, fully dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[11] Thus, in my view, it is trite law that if an order fully disposes of the rights of the parties thereto it is a final order in the true legal sense of the word and, if it does not the order is merely an interlocutory order.

[12] In order to counter the above ratio of Lord Denning MR in *Purcell v. FC Trigell Ltd & Anor (supra)* and Lord Alverstone's test in *Bozson,* the counsel for the defendant submitted that:

Re Interlocutory Or Final Order

> This issue does not arise for 2 reasons i.e. the Order in question was not made on any (interlocutory) application and no application for an injunction was then pending before this Court. Conversely, had the Order in question been made on an application, then such an Order would have been appealable and **in that sense, it was a final order and not interlocutory order *albeit* made on an interlocutory application.** (emphasis added)

[13] I do not agree with this untenable contention which defies logic and reason, as surely, in my considered view any order made by the court pending the final disposal of a suit is an interlocutory or interim order and not a final order irrespective of whether it was made upon any interlocutory application. This court is clothed with ample powers, at this interlocutory stage of the proceedings, to meet the justice of the case between litigants by setting right what, in my opinion, was a slip-up by counsel for the plaintiff who unfortunately did not then anticipate the high probability of occurrence of the common phenomenon of transmutation of company shares in the course of time. Of course, in this exercise the court should subject the plaintiff to being condemned in costs of the application.

[14] Notwithstanding my above view, in this suit, 15 January 2003 consent order was indeed made during the hearing of an interlocutory application filed by defendant to set aside the interim injunction granted by the court. Then, by the consent order, the parties agreed to discharge the injunction order on the defendant's undertaking not to dispose of the SunCon shares or to put any encumbrance on same pending disposal of this suit. It is undisputed that the consent order was made pending, and at the early stage of, the proceedings which till now await a trial date. In the light of those facts surely it could be gainsaid that the consent order did not finally dispose of the rights of the parties, as this suit is presently in progress, and the plaintiff has indeed filed the notice to appear for pre-trial case management with the view to fix a trial date. Based on the principle enunciated in *Purcell v. FC Trigell Ltd & Anor (supra)*, I would hold that this court has jurisdiction to vary the consent order without the need for the plaintiff to commence fresh action to set aside or vary the consent order due to the obviously interlocutory nature of the order made.

[15] Notably, in exceptional cases, even a consent order which is a final order and has been perfected can be set aside in the same action. Peh Swee Chin FCJ delivering the judgment of the Federal Court in *Khaw Poh Chuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185 had this to say in that regard:

> Thus in *Marsden v Marsden* [1972] 2 All ER 1162 a divorce case, counsel for the wife agreed to a consent order for her to release her charge on the matrimonial home and to be paid maintenance for herself and her children. All these were contrary to her express instructions, and this was unknown to counsel for the husband. On the same day the consent order was extracted, either contemporaneously or some time before, the wife applied to set aside the consent order. *It was set aside by the learned judge holding or approving the proposition that in such cases, the court had power to interfere in setting aside the consent order for in the circumstances, grave injustice would be done by allowing the compromise to stand, although the limitation of counsel's authority was unknown to the other side. By the way, this case in another way seems to be an exception on its own facts to the rule that a consent order, when perfected, can only be set aside in a fresh action, and not in the same action in which the consent order was made.* (emphasis added)

[16] After careful consideration of the affidavits and submissions put in by both sides, I am satisfied that 650,000 SunInc shares and cash sum of RM715,000 are true and absolute derivative shares and benefits derived from the original 650,000 SunCon shares – the defendant's counsel has also made no cogent riposte against this derivative aspect. Indeed, when the plaintiff applied to amend the statement of claim to reflect the present situation in respect of the replacement of the shares from SunCon to SunInc the defendant raised no objection. The pleadings of both sides thereafter were then amended to reflect the change of circumstances. In the light of what has happened after the consent order was recorded, the subject matter of the consent order is no longer in existence and unless the order is varied, it is incontrovertible that the agreement arrived by the parties would remain a dead letter. Indeed, there is nothing to prevent the defendant from dealing with the SunInc shares now registered in her name pending trial, in the event that the court should refuse to intervene to preserve the real subject matter in dispute. I am of the considered view that it would be unjust for the court not

A to take cognizance of the change in circumstances which had the effect of nullifying the consent order entered into following the injunction order. The defendant has since 2004, received the cash payment of RM715,000. This court is not privy to what she has done to this cash payment, which, in my view constituted unjust
B enrichment pending trial. In order to avoid such unjust enrichment to the defendant pending disposal of this suit, the court ought to exercise its discretion to preserve the subject matter in dispute. It would cause grave injustice to the plaintiff, if this court should refuse the order that he now seeks.

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[17] For the foregoing reasons encl. 33 ought to be and is now allowed, but with costs to the defendant in any event.

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